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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 428

Government and Civic Employees Organizing Committee, CIO, an Unincorporated Association; E. J. Habshey,
Appellants

VS.

S. F. Windsor, Harrell Hammonds, Knox McRae, Clarence V. Evans, and Melvin Dawkins,
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 423.

GOVERNMENT AND CIVIC EMPLOYEES ORGANIZING COMMITTEE, CIO, AN UNINCORPORATED ASSOCIATION; E. J. HABSHEY,

Plaintiffs-Appellants,

vs.

S. F. WINDSOR, FELIX L. PARSONS, HARRELL HAMMONDS, KNOX McRAE, CLARENCE V. EVANS, AND MELVIN DAWKINS,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION.

REPLY BRIEF FOR APPELLANTS.

ARGUMENT.

I. THE CONSTITUTIONALITY OF THE SOLOMON ACT, AS APPLIED TO PLAINTIFF UNION AND ITS MEMBERS, IS SQUARELY BEFORE THIS COURT.

This case, as our original Brief has demonstrated, presents to this Court for the first time a state's attempt to bar union membership for all state employees, solely

because of their belief in the principle of collective bargaining. The constitutional issues have now been presented in even sharper focus by defendants' stress (Def. Br. 15-17) on the manner in which the beliefs of plaintiff Union and its members have been translated into "action." Plaintiffs' Brief 19-21 has already dealt with the matter of plaintiff Union's activities in aiding its members to process grievances. But now defendants discover the most grievous "action" of all (Def. Br. 17):

> "The above testimony of Battles not only tends to show that the union is not a mere discussion group as claimed, but that the union and the state employee members thereof have engaged in sponsoring collective bargaining legislation for state employees and have attempted to defeat legislation which prohibits collective bargaining. As individuals the constitutional right is there, but as state employees it is not. Such action is contrary to the declared public policy of the State of Alabama."

To state this proposition without authority—the only manner in which it can be stated—is to typify defendants' entire case. The public policy of the State of Alabama is, it seems, superior to the United States Constitution's guarantees of freedom of speech and the right to petition for redress of grievances, even when those rights are being exercised only to change that public policy by orderly legislative means. The Constitution cannot be read so to make public employment the equivalent of serfdom, or to condition such employment on the surrender of these most basic freedoms.

Aside from this straightforward (although untenable) statement of constitutional "principle", defendants seek vainly to avoid the constitutional issues before this Court. They wholly ignore, because they cannot cope with, the basic proposition that this Court, not the state courts or

defendants, will determine the constitutional impact of the Solomon Act as applied by the state courts. Instead they attempt to sidestep the constitutional questions by avoiding the record and arguing that plaintiff Union is a collective bargaining organization which can, therefore, be outlawed. This sleight-of-hand is accomplished by quoting plaintiff Union's purposes and placing one of them (that of improving its members' lot by "negotiation" or "collective bargaining") in bold face type (Def. Br. 12)—apparently hoping to obscure the fact that on the undisputed record those purposes are stated in the alternative as "negotiation or other *legitimate* means" (R. 3) (italics added).

Such attempt by defendants simply will not wash; for it is beyond cavil that the Alabama state courts' square decision was (R. 144, affirmed R. 62):

> "Said Statute of Alabama [Solomon Act] applies to complainant [Union], its activities and its members all as described in the complaint."

Defendants' Brief 12, although it is careful to emphasize the term "negotiation" as one of plaintiff Union's purposes, is not equally careful in quoting the part of plaintiff's complaint which limits that purpose. Defendants' quotation substitutes the word "as" for the word "or"—but the complaint itself states plainly that plaintiff Union exists (R. 73):

> "in order to improve, by negotiation, the conditions of employment for and the quality of service rendered by such employees *or* to effect such improvement by legislation, or other legitimate means" (italics added).

But no amount of quotation, whether by defendants or by ourselves, or whether in or out of context, can alter these simple propositions, established by the uncontradicted record:

1. Plaintiff Union engages in collective bargaining only where such means is permissible under the applicable state law.

2. When defendants' predecessors denied plaintiff Union's right to negotiate with them, plaintiff Union refrained from so doing.

3. Such abstention was in accordance with its basic organization and purposes.

4. Notwithstanding such abstention, the Solomon Act outlaws the belief in collective bargaining shared by plaintiff Union and its members.

The constitutional questions presented by such application of the Solomon Act are squarely before this Court.

II. THE SOLOMON ACT, AS APPLIED TO PLAINTIFF UNION AND ITS MEMBERS, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Defendants are equally unwilling to meet, on the merits, the due process issues as presented by our original Brief 16-18. No attempt whatever is made to deal with the controlling principles established by *Slochower* v. *Board of Higher Education*, 350 U. S. 551 (1956); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); *Garner* v. *Board of Education*, 341 U. S. 716 (1951): principles which condemn the Solomon Act out of hand. *Adler* v. *Board of Education*, 342 U. S. 485 (1952), only exemplifies the same limitations on state power expressed in *Slochower*, 350 U. S. 551, 555 (1956):

> "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful and nondiscriminatory terms laid down by the proper authorities."

The prohibition (as in *Adler*) of membership in organizations which advocate the unlawful overthrow of govern-

ment, knowing of such purposes, contrasts sharply with the prohibition of mere membership in plaintiff Union. Whatever may be said as to the former, the latter prohibition is wholly unrelated to the issue of fitness for public employment.

Confronted with the adverse decisions of this Court, Defendants' Brief 20-22 attempts to fall back on several state court decisions barring unionization of policemen and firemen. As our original Brief 18 pointed out, it is more than coincidence that every one of those cases specifically rested on and quoted from the decision in *Carter* v. *Thompson*, 164 Va. 312, 180 S. E. 410, 412 (1935), treating policemen and firemen as "a class apart" because of the special semi-military disciplinary problems involved.

We do not presume to anticipate this Court's decision in *Verhaagen* v. *Reeder*, Docket No. 603, October Term, 1956, which involves the precise issue of prohibiting union membership for firemen. Suffice it to say that the Solomon Act is not so narrowly drawn. Even if the state's interest in matters of public order and safety might be considered to justify barring union membership for policemen or firemen (or even for employees in the State Insane Hospitals, as urged at Def. Br. 21), that justification could not and does not apply to *all* state employees. Plaintiff Habshey's employment as a retail liquor salesman typifies the broad areas of government employment to which the proscription of mere union membership cannot constitutionally extend. This is not the first time this term, nor will it be the last, that legislation of broad application is constitutionally defective in an area where a narrowly drawn statute might conceivably be upheld.

Butler v. *Michigan*, 352 U. S. 380, 383 (1957).

Cf. *Wieman* v. *Updegraff*, 344 U. S. 183, 190 (1952).

Joseph Burstyn, Inc. v. *Wilson*, 343 U. S. 495, 504-6 (1952).

Defendants' Brief 21 again discloses a willful confusion between the premise that a man has no constitutional right to government employment and the attempted conclusion that a government employee has no constitutional rights. It is no answer for defendants to characterize plaintiff Union as a "master" which plaintiff Habshey cannot "serve" without violating his "undivided allegiance" to the state. Such concept of "undivided allegiance" would likewise preclude mere membership in an established church (certainly "an organization distinct from the State of Alabama and national in its scope," Def. Br. 21)—and such concept of "undivided allegiance," applied to preclude such church membership or membership in plaintiff Union, violates the due process requirements recognized in *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100 (1947), and repeated in *Wieman* v. *Updegraff*, 344 U. S. 183, 191-92 (1952). There is indeed a real distinction between private employment and public employment, but it is not the distinction that defendants assert; rather the distinction is that action by the public employer is State action which is subject to the commands of the Fourteenth Amendment.

III. THE SOLOMON ACT AND THE EXCLUSIONS THEREFROM VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

On the issue of equal protection, we submit that nothing need be added to the discussion at our original Brief 22-23. We do not dispute the platitudes asserted by defendants that the legislature may "recognize degrees of harm" and establish "reasonable classifications." Those platitudes, however, have no application to the completely arbitrary classification and exclusions attempted by the Solomon Act. No statute which "recognizes degrees" of a

wholly non-existent harm can satisfy the Fourteenth Amendment.

Thus the question posed by our original Brief 23 remains unanswered: What is the "evil" inherent in Union membership for state employees that does not likewise taint such membership among teachers, among city employees (including policemen and firemen), among county employees, or among State Docks Board employees? The record shows that substantially all of the last mentioned group are members of, and are represented by, the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen; and the state has actually negotiated schedules of wages and rules with those unions governing the employment of their members since 1936 (Pl. Ex. 12; App. A. to this Brief).* Yet according to defendants the mere membership of state-employed liquor salesmen in plaintiff Union, without any attempted negotiation of wages or working conditions, gives rise to the spectre of "divided allegiance." Such patent and arbitrary discrimination cannot withstand the constitutional requirement of equal protection.

IV. BOTH PLAINTIFF UNION AND PLAINTIFF HABSHEY CLEARLY HAVE STANDING TO MAINTAIN THIS ACTION.

Defendants conclude their Brief by pointing out two elements which they apparently regard as affecting plaintiffs' rights to maintain this action (Def. Br. 24-25). Neither point has any more substance than their arguments on the merits.

First, as to plaintiff Habshey, defendants and their at-

* Although plaintiffs designated Pl. Ex. 12 as part of the record to be printed in this Court, it was inadvertently omitted from the printed Transcript of Record. We have reprinted it as Appendix A to this Brief.

torneys assured the District Court that the Solomon Act would not be applied to forfeit any of his rights pending the Court's final decision (R. 36). Plaintiff Union's complaint for declaratory judgment in the Alabama state courts was brought on behalf of itself and its members (R. 77-78), and the construction of the Solomon Act by the Alabama Supreme Court is binding on plaintiff Habshey. It would be a solecism to consider that plaintiff Habshey lacks standing where a reasonable time has been devoted by plaintiff Union to securing a construction of the Act fully binding on both plaintiffs. Of course, the District Court did not so hold, but ruled on the merits as to both plaintiffs.

Second, as to plaintiff Union, defendants cite and quote from *Hague* v. *C. I. O.*, 307 U. S. 496, 514, 527 (1939). Of course, this Court's decision in *Hague* that an unincorporated association is not a "citizen of the United States" entitled to maintain a suit under the Civil Rights Act for deprivation of privileges and immunities is wholly inapposite here. Plaintiff Union may not be a "citizen", but it is most certainly a "person" for purposes of enforcing the due process and equal protection rights of itself and its members under the Fourteenth Amendment.

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U. S. 123, 140-41, 143, 159, 186-87, 198-202 (1951).

American Communications Association, C. I. O. v. *Douds*, 339 U. S. 382 (1950).

CONCLUSION.

Nothing in Defendants' Brief, either substantive or procedural, in any way modifies our position that the District Court's judgment should be reversed and the enforcement of the Solomon Act should be enjoined.

Respectfully submitted,

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APPENDIX A.

Plaintiff's Exhibit 12.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Alabama,
Southern Division.

Government & Civic Employees Organizing Committee, CIO, an unincorporated association, et al., *Plaintiffs,*
vs.
S. F. Windsor, et al., *Defendants.*
} Civil Action No. 7466.

AFFIDAVIT.

STATE OF ALABAMA, JEFFERSON COUNTY. } ss.

The undersigned, being first duly sworn, deposes and says: Affiant is reliably informed, and upon such information affirms that substantially all employees of the Terminal Railroad operated by the Alabama State Docks Board (sometimes referred to as State Docks Commission) an agency of the State of Alabama, are members of and are represented by the Brotherhood of Locomotive Firemen & Enginemen and the Brotherhood of Railroad Trainmen (labor organizations comprised of and representing employees who work on railroads). Since about 1936, these labor organizations have negotiated schedules of wages and rules governing employees. Such schedules, negotiated

with the above State Agency, are presently in effect. Such employees are referred to in Title 38, Article 17, 1940 Code of Alabama.

Affiant further deposes and says: There are municipal and county employees in Alabama who are now members of labor organizations that negotiate their wages, hours, and working conditions.

Your affiant is a Representative of the Government & Civic Employees Organizing Committee.

/s/ MAURICE R. ALLEN.

Sworn to and subscribed before me this 7th day of February, 1956.

/s/ HUGO L. BLACK, JR.,
Notary Public.

(SEAL)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 423

Government and Civic Employees Organizing Committee, CIO, an Unincorporated Association; E. J. Habshey,
Appellants

VS.

S. F. Windsor, Harrell Hammonds, Knox McRae, Clarence V. Evans, and Melvin Dawkins,
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed or that the appeal be dismissed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

ARGUMENT

The facts are stated in the opinions of the District

Court and the Supreme Court of Alabama, which are appended to appellants' statement as to jurisdiction, and need not be repeated here.

Act No. 720, General Acts of Alabama, 1953, page 974, commonly called the Solomon Bill, set forth as Appendix E to appellants' Jurisdictional Statement, provides that any public employee who joins or participates in a labor union or labor organization, or who remains a member of, or continues to participate in, a labor union or labor organization thirty days after the effective date of the act, shall forfeit all rights afforded him under the State Merit System, employment rights, reemployment rights, and other rights, benefits or privileges which he enjoys as a result of his public employment.

The act defines a "labor union or labor organization" as being any organization of any knid, in which employees participate for the purpose of dealing with one or more employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

In short, the act prohibits a state employee from being a member of or participating in such an organization for the purpose of collective bargaining with the state.

It is here pointed out with emphasis that appellant union is not a mere discussion group as claimed by it. The Supreme Court of Alabama in the opinion reported in 262 Ala. 785, 78 So. 2d 646, specifically found otherwise.

In addition to other reasons given in the Court's opinion, it pointed out that the evidence showed that after the passage of Act No. 720, supra, a representative of appellant union testified, "I went there with a group of employees before the Personnel Board after that, and we did settle quite a few grievances which they had."

The State of Alabama has not attempted to bar its employees from membership in a discussion group as contended by appellant. The whole purpose of the act is to bar membership in a union organized and existing for collective bargaining purposes. This the State can do without offending any provisions of the Constitution, State or Federal.

After pointing out that appellant union exists for the very purpose of collective bargaining, the Court said in 262 Ala. supra:

> "We think it entirely clear that the provisions of the Solomon Bill have application to a local union sponsored and operated according to the terms and provisions of the rules of the Committee and the Constitution of the Organization. Public employees, as defined in the Solomon Bill, who become members of such an operated local union are subject to the penalties therein provided. We do not understand appellant to contend to the contrary."

In the opinion of the District Court, reported in 116 F. Supp. 354, the Court said:

> "As to employees working for the state, there can hardly be any dispute that the settlement of griev-

ances, labor disputes, wages, rates of pay, hours of employment and conditions of work are matters for the state government to be performed through its legislative and executive departments, and are not matters for collective bargaining to be participated in by a labor union or labor organization. Section 1 of the act defines 'labor union or labor organization' and as so defined, the act could well be construed by the state courts simply as prohibiting a public employee from being a member of or participating in such an organization for the purpose of collective bargaining with the state, and, as so construed, meet the challenge of unconstitutionality." The Supreme Court affirmed 347 U.S. 901.

The chief reasons denying the right of public employees to engage in union activities must be kept clearly in mind. They are stated in 31 A. L. R. 2d 1152, to be as follows:

"Chief among the reasons advanced by the courts in denying the right of public employees to engage in union activities are the sovereignty of the public employer; the fact that the government is established by and run for all of the people and not for the benefit of any person or group; that the profit system is missing in public employment; that public employees owe undivided allegiance to the public employer; and that the continued operation of public employment is indispensable in the public interest."

The following additional authorities show that Act No. 720, supra, is constitutional and valid. *Hickman v. City of Mobile*, 256 Ala. 141, 53 So. 2d 752; *Barton v. City of Bessemer*, 234 Ala. 20, 173 So. 626; *King v.*

Priest, 357 Mo. 68, 206 S. W. 2d 547, appeal dism., 333 U. S. 852, 68 S. Ct. 736, 92 L. Ed. 1133, rehearing den. 333 U. S. 878, 68 S. Ct. 901, 92 L. Ed. 1154; *City of Jackson v. McLeod*, 199 Miss. 676, 24 So. 2d 319, (certiorari denied 328 U. S. 863, 66 S. Ct. 1368, 90 L. Ed. 1633); *Fraternal Order of Police v. Lansing*, 306 Mich. 68, 10 N. W. 2d 310, (certiorari denied 321 U. S. 784, 64 S. Ct. 781, 88 L. Ed. 1076); *Miami Local Water Works v. City of Miami*, 157 Fla. 445, 26 So. 2d 194, 165 A. L. R. 967; *Coane v. Geary*, 298 Ill. App. 199, 18 N. E. 2d 719; *Hutchinson v. Magee*, 278 Pa. 119, 122 A. 234; *Carter v. Thompson*, 164 Va. 312, 180 S. E. 410; *McNatt v. Lawther*, Tex. Civ. App., 223 S. W. 506; *San Antonio Fire Fighters Local v. Bell*, Tex. Civ. App. 223 S. W. 506; *C. I. O. v. Dallas*, Tex. Civ. App., 198 S. W. 2d 143.

See also articles in 45 Ill. Law Rev. 364; 54 Harv. Law Rev. 1360; 47 Yale L. J. 1109; Rhyne, "Labor Unions and Municipal Employee Law," 1946; 31 A. L. R. 2d 1143-1180.

There is no unconstitutional discrimination in the act. The classification and exceptions are entirely reasonable and are matters within the discretion of the Legislature. The state has the right to make the act apply to immediate state agencies, and to exclude teachers and cities and counties. *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421.

The exception of the act's application to employees of the State Docks Board who are subject to the Railway Labor Act is fully sustained by *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 471-472, where it is said:

"The contention that the act denies equal protection because its provisions, or some of them, have not been extended to business corporations or associations or to labor organizations which are subject to the Railway Labor Act, 45 USCA §§151 et seq, 10A FCA title 45, §§151 et seq, is without substance. The Constitution does not oblige a state to regulate or reform all types of associations and organizations, or none. It may begin with such as in its judgment most need regulation."

The judgment of the District Court is founded on such a solid and definite line of judicial precedent that no substantial question is presented by this appeal entitling appellants to invoke jurisdiction of the Supreme Court of the United States.

It is emphasized again that the Circuit Court of Montgomery County, Alabama, and the Supreme Court of Alabama, have found as a fact that appellant union exists and its members who are employees of the State participate therein for the purpose of collective bargaining with the State: this despite appellant's contention to the contrary.

As hereinabove pointed out, the reasonable conclusion from reading the decision of the Supreme Court of Alabama is that in the Court's opinion the act was passed to prohibit a State employee from membership in a union for the purpose of collective bargaining with the State. Courts must construe acts so as to render them constitutional, if possible, and not unconstitutional.

The appellants must come within the act in order to raise constitutional questions as to its validity, for

only those to whom a statute applies and who are adversely affected by it can draw in question its constitutionality. *Red River Valley National Bank v. Craig*, 181 U. S. 548; *Ala. State Fed. of Labor v. McAdory*, supra.

If appellant union exists and appellant Habshey participates therein purely for discussion purposes as claimed by them, then they would have no right to raise the constitutional questions attempted to be raised in this case.

WHEREFORE, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the District Court be affirmed.

Respectfully submitted,

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I, William N. McQueen, one of the attorneys for appellees, S. F. Windsor, Harrell Hammonds, Knox McRae, Clarence V. Evans, and Melvin Dawkins, appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the .....day of September, 1956, I served copies of the foregoing statement opposing jurisdiction and mo-

tion to dismiss or affirm on the several appellants thereto by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows:

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